

**STATE OF NEW HAMPSHIRE
SUPREME COURT**

No. 2020 - 0260

Brent Tweed and G&F Goods, Plaintiffs

v.

Town of Nottingham, Defendant

RESPONSE TO MOTION FOR SUMMARY AFFIRMANCE

The Nottingham Water Alliance (“NWA”), by and through its undersigned counsel, hereby emphasizes the following points of fact and law in objection to the Plaintiffs’ Motion for Summary Affirmance (“Motion”):

- I. The NWA’s appeal raises substantial questions of law, and these issues were either not addressed by the Superior Court or were resolved in a manner contrary to Supreme Court precedent.**

To qualify for summary affirmance according to Supreme Court Rule 25(1)(a), the appellant must have failed to present a substantial question of law *and* the Supreme Court must agree with the result below. Similarly, Supreme Court Rule 25(1)(b) requires both that the trial court opinion identified and discussed the issues presented *and* that the Supreme Court agrees with their resolution.

Each issue that the Notice of Appeal (“NOA”) presents is a substantial question of law, which either the trial court did not discuss or the trial court decided in a way that contradicts existing Supreme Court precedent. As Plaintiffs noted, the Rockingham Superior Court furnished two opinions addressing the issue of whether the NWA might intervene. App to NOA at 44,

NOA at 13. These opinions, to the extent that they discuss the questions presented, misconstrue existing New Hampshire precedent governing intervention. Other substantial questions raised in this appeal are not directly answered. A full briefing of the matter in this appeal is warranted to settle these discrepancies and to clarify any ambiguities in the test for intervention.

A. Whether the NWA satisfies the Rule 15 Standard for intervention was addressed by the trial court, but the application of this rule deviates from existing Supreme Court precedent governing intervention.

As the NWA mentions in its NOA and as it seeks an opportunity to fully brief, the trial court denied intervention to the NWA despite its position analogous to the intervenor-residents in *G2003B, LLC v. Town of Weare*, 153 N.H. 725 (2006).

The Rockingham Superior Court distinguished *Weare* from the facts of this case by claiming that the Supreme Court meant to say *amicus curiae* rather than *intervenor* when affirming a trial court decision granting residents status as intervenors to defend an ordinance they helped to enact. Should the *Weare* court have wanted to allow the residents to submit an *amicus* brief, the *Weare* court could easily have used that language rather than permitting the residents explicitly to participate as intervenors.

The NWA has demonstrated that it is prepared to brief in full the necessary question of what the New Hampshire Rules of Civil Procedure and this Court require in order for a prospective party to qualify for intervention in a state court proceeding. A cursory examination of the facts and case law on intervention indicates that the NWA likely qualifies.

B. The NWA's appeal presents a substantial question, which the trial court decided using reasoning that the Supreme Court has ample grounds to disagree with: whether a prospective intervenor to a New Hampshire State Court proceeding must first show State Constitutional standing.

This issue, like the one above, was not addressed in full in the trial court opinions and to the extent that it was addressed, the trial court reached a conclusion opposite to what New Hampshire precedent suggests.

The Rockingham Superior Court took a side in the federal Circuit split over whether a party seeking to intervene under Federal Rule of Civil Procedure 24 must first satisfy requirements for federal Constitutional standing. Resolving this split does not however answer the real question: does New Hampshire Superior Court Civil Rule 15 require a prospective intervenor to first show state Constitutional standing?

Affirming the trial court's answer to this question would require this Court to reverse its prior position in *Am. Fed'n of Teachers v. State* that challenges to intervenor standing can be waived. 167 N.H. 294, 299 (2015). If a party can waive a challenge to intervenor standing, then intervenor standing must not be the same as Constitutional standing, which any party, or court acting *sua sponte*, can challenge at any time.

Based on prior opinions, the NWA posits that the Supreme Court does not agree with the Superior Court's resolution of this issue, and thus summary affirmance is inappropriate.

C. The trial court failed to address a substantial question of law: whether the right of intervention vested by an ordinance in its residents is by definition a right and a direct and apparent interest in the defense of the ordinance so as to satisfy New Hampshire Superior Court Civil Rule 15.

Both of the Rockingham Superior Court's orders denying the NWA's Motion to Intervene and Renewed Motion to Intervene overlook the argument that a legal right to intervene is itself a right and apparent interest in intervention that the Freedom from Chemical Trespass Ordinance ("Ordinance") vests in residents of Nottingham, including the members of the NWA.

This is a substantial question of law, addressed only indirectly through the trial court's findings that the NWA lacks a right and a direct, apparent interest.

II. Plaintiffs' proposed record material is irrelevant and Plaintiffs' increased litigation costs are not just cause for summary affirmance.

The issue in this appeal is simply whether or not the NWA may intervene. The merits of Plaintiffs' thus-far unopposed attack on the Ordinance are the purview, currently, of the Rockingham Superior Court.

As *amicus curiae*, the NWA may not appeal the inevitable¹ decision from the Rockingham Superior Court overturning the Ordinance. Should the Supreme Court summarily affirm this appeal, this Court will lose its chance to weigh in on the merits of the Freedom from Chemical Trespass Ordinance. However, the validity of the Ordinance is not properly disputed between these parties here, prior to a grant of intervention granting the NWA party status.

Plaintiffs object to the NWA's participation in this lawsuit because the NWA's intervention would increase Plaintiffs' attorneys fees. Mot. at 3. Possibly, Plaintiffs also worry that serious advocacy from the NWA in a court that approaches facts and circumstances with an open mind could mean not procuring attorneys' fees from the Town of Nottingham.

Plaintiffs are not entitled to victory without opposition. Without the NWA, Plaintiffs would hardly need to marshal an argument to obtain their requested relief that the existing Defendant is all too happy to concede. The integrity of the public's decision to enact local legislation is at stake should this case be decided with no opposing party. That, alone, should

¹ The only defense of the Ordinance was brought by a non-party, and thus the Superior Court is precluded from using that defense as a basis for deciding against Plaintiffs' otherwise unopposed claims that the Ordinance is invalid. *United States v. Sinenery-Smith*, 590 U.S. __ (2020) (prohibiting courts from deciding the merits of a case based on an argument discussed only between a party and a nonparty). The only valid result at the trial court level is a verdict for Plaintiffs, which the town has already conceded.

favor a grant of intervention. Plaintiffs chose to litigate despite suffering no and now implore this Court to help them save expenses. Plaintiffs have no Constitutional right to a cakewalk.

Additionally, the material in Plaintiffs' Objection to NWA's Motion to Intervene and the arguments Plaintiffs advance with this would-be exposé are irrelevant. Pls.' Exh. #2. The fact that a public interest organization funds legal assistance to an otherwise indigent community group has no bearing on the validity of the arguments provided. Counsel for the NWA has manifested good faith arguments in favor of the Ordinance and asks only for the chance to have a court, rather than the Town of Nottingham through its decision not to present a defense, be the body to arbitrate the legal merit of a democratically-enacted measure.

III. CONCLUSION

The NWA seeks the opportunity to fully present facts and law to show that the NWA ought to have been allowed to intervene, but regardless of whether or not the Supreme Court believes at this stage of the appellate proceedings that intervention was warranted, the substantive issues raised in this appeal are indisputable.

Dated: June 17, 2020



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was electronically delivered this date to all counsel of record, specifically:

Richard Lehmann, attorney for Brent Tweed and G&F Goods, LLC.

Michael Courtney, attorney for Town of Nottingham

Dated: June 17, 2020

A handwritten signature in cursive script, reading "Kira Kelley", is written over a horizontal line.

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